United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

74-1433

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United States Court of Appeals

FOR THE SECOND CIRCUIT.

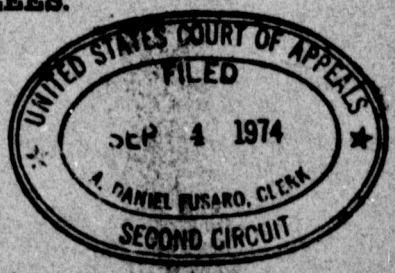
ANNE QUINN CORP. and EARL J. SMITH & CO., INC., n/k/a U. S. BULK CARRIERS, INC.,
Plaintiffs-Appellees,

against

AMERICAN MANUFACTURERS MUTUAL INSURANCE COMPANY,
Defendant-Appellant.

On Appeal From the United States District Court for the Southern District of New York.

BRIEF OF PERSONAL INJURY AND DEATH INTERVENORS-APPELLEES.



MARVIN I. BARISH,
SANFORD I. JABLON,
ABRAHAM E. FREEDMAN,
346 West 17th Street,
New York, N. Y. 10011
929-8410

Attorneys for Personal Injury and Death Intervenors-Appellees.

International Printing Co., 711 So. 50th St., Phila., Pa. 19143 — Tel. (215) 727-3711

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COUNTER-STATEMENT OF THE ISSUES PRESENTED FOR REVIEW.

1. Where there is sufficient evidence to substantiate the findings of fact of the District Judge, can these findings be considered "clearly erroneous"?

2. Did not the District Judge properly find that there was no concealment of a material fact in the formation of Ocean Marine Policy DE3540?

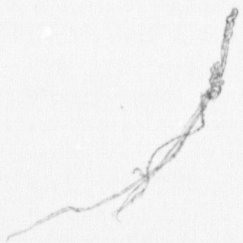
3. Did not the District Judge properly interpret Ocean Marine Policy DE3540 to allow appellees' indemnification for personal injury, death and property claims occasioned by the loss of the S. S. "Smith Voyager"?

COUNTER-STATEMENT OF THE CASE.

This action arises out of the aftermath of the marine disaster affecting the S. S. "Smith Voyager" during the latter part of December, 1964, while she was enroute from Houston, Texas to India. The facts surrounding this disaster have been described previously in *Petition of Long*, 293 F. Supp. 172 (S. D. N. Y. 1968), aff'd 439 F. 2d 109 (2d Cir. 1971).

On August 18, 1964, Anne Quinn Corporation and Earl J. Smith, Inc. entered into a contract of insurance. The consideration for this contract was a premium of $7,500, paid by Anne Quinn Corporation and E. J. Smith, for which premium the appellant insured Quinn and Smith and their vessels, including the "Smith Voyager" for a period of one year, for all sums which the assureds should become legally liable to pay on account of personal injuries, including death.

The "Smith Voyager" disaster occurred during the period when this policy was in effect. Thirty-two members



of the crew, the personal representatives of the estates of four crew members lost during the rescue operations, and the owner of the cargo aboard the vessel filed claims totalling $16,000,000 in the limitation proceeding instituted by plaintiffs and Sumner A. Long. The Trial Court denied the petition to limit liability and ordered the adjudication of the amount of claimants' damages. Shortly before oral argument on the appeal, Long agreed to pay the claimants $1,821,000 in settlement of their claims against him. His appeal was withdrawn subject to the approval by this Court of the stipulation of settlement. Pursuant to Court Order, a settlement was approved against Long, without prejudice to the rights of the claimants to pursue and recover judgments from Anne Quinn Corporation and Earl J. Smith in order to obtain full redress of the respective damages.

On March 3, 1971, this Court affirmed the determination of the Trial Court and remanded for disposition of the claims for damages. *Petition of Long*, 439 F. 2d 109.

The policy of the primary insurer, The London Steamship Owners' Mutual Insurance Association Ltd., was exhausted as a result of the Long settlement. Quinn and Smith were insolvent. The individual and cargo claimants, having received partial payment of their claims under the settlement, brought this action in admiralty for a declaratory judgment, seeking additional damages, under the excess policy issued by the appellant. That policy is an excess insurance policy whereby American Manufacturers agreed to indemnify its assured for all protection and indemnity risks of whatsoever nature, including but not limited to those covered by the primary insurance policy with respect to all claims for personal injury and property damage in excess of $2,000,000 and up to $5,000,000 for each vessel covered, each accident. The term of the policy ran from Noon, August 13, 1964 to Noon, August 13, 1965, and the annual premium was $7,500.

The Complaint at bar alleges that under the policy, American Manufacturers was liable to its assured to take over the defense of the pending claims and, in the event that the assured should be held liable, to indemnify the assured up to the $5,000,000 limitation of the policy. There is no dispute that American Manufacturers received timely notice from their assured of the sinking of the SS "Smith Voyager" and of the presentation of the personal injury, death and property damage claims. Further, American Manufacturers associated with Anne Quinn Corporation and Earl J. Smith in the defense and control of the claims from the date of its receipt of notice of the collision until November 25, 1968 (after the Trial Court's determination that the overloading had caused the sinking of the SS "Smith Voyager"), when American Manufacturers notified Smith and Quinn that it considered the policy to be void and tendered return of the $7,500 premium, which tender was not accepted and the check returned to American Manufacturers by Quinn and Smith on December 4, 1968.

Appellant denied liability under the policy on the following grounds: (1) That the policy was void from its inception because Quinn and Smith did not disclose at the time it was issued their practice of overloading their vessels; and (2) That under clause 1(a) of the policy's exclusions, the policy did not cover Smith and Quinn's losses because they were caused by the intentional overloading of their vessels.

Appellees on the other hand contend that there was no fraud with respect to the issuance of the policy because it was a matter of common knowledge in the industry that "tramp" vessels such as the "Smith Voyager", engaged in the grain trade from United States Gulf ports to India would leave the Gulf ports loaded to their marks with fuel

to reach Caribbean bunkering ports, would then take on bunkers for the voyage across the Atlantic Ocean and would leave the bunkering ports overloaded. This practice was known or should have been known by American Manufacturers at the time the policy was issued and, therefore, the policy was not voidable. Appellees also contend that the overloading of the "Smith Voyager," which the Court found violated the United States Load Line Act, 46 U. S. C. Sec. 85, was, at most, an intentional noncompliance with a statute within the meaning of clause 1(b) of the policy's exclusions, entitling the assured to indemnity for personal injury and property damage claims.

The trier of fact, having heard the evidence and having had the opportunity to observe the witnesses in their testimony, concluded that policy of insurance was not void and that appellees were entitled to recover under it to the extent that their claims are "occasioned by actual or alleged bodily injury (fatal or otherwise) or physical loss of, damage to, and/or loss of use of tangible property." In reaching this conclusion, the Trial Court found specifically that the vessel owner did engage in the practice of overloading the vessels; that the practice of overloading vessels bound for the Far East at Freeport was a common practice in the industry; that the knowledge of the practice of overloading at Freeport was widespread in the industry; and that the appellant knew or should have known of it. These findings were based upon substantial, credible and clear evidence which at no time was contradicted by appellant. When viewed against the factual legal backdrop of this action, American Manufacturers' appeal should be dismissed and the findings and conclusions of the Court below sustained.

ARGUMENT.

I. An Insurer Is Charged With Knowledge of Practices in the Industry and May Not Disclaim Under a Policy of Marine Insurance Because of a Non-Disclosure of a Fact or Practice When That Practice Is of Some Notoriety and Where the Insurer Therefore Should Have Been Aware of the Practice or, by a Degree of Inquisitiveness, Would Have Made Itself Aware of the Practice.

While the doctrine of "uberrimae fidei" is viable in the maritime field, that concept has no bearing whatsoever where the fact which allegedly was withheld was known in the industry. In this regard, the underwriter may not claim ignorance of custom and usages of the trade which he attempts to insure. Thus, in *Couch on Insurance*, the concept is clearly stated that

> "The underwriter of a marine risk is presumed to be acquainted with the general course and incidents of trade, with the general risks affecting commerce with particular countries, and with the established import of terms used in their contracts, and such facts need not be disclosed. General, established, and notorious usages are also presumed to be known to the underwriter, and need not be disclosed, *as well as the nature and circumstances of the trade involved and the usual course of loading or unloading at particular ports, or a usage to prolong the ship's stay.*" 9 Couch 2d, Insurance Sec. 38.88 (Emphasis supplied)

In the case of *Planche v. Fletcher*, 99 Eng. Rpts. 164 (1779) wherein a marine underwriter attempted to disclaim on a policy because the vessel had been leaving England

with papers which did not indicate the true nature of her voyage, Lord Mansfield stated:

> "This verdict is impeached upon two grounds. 1. It is said, there was a fraud of the underwriters in clearing out the ship for Ostend, when she was never intended to go thither. But I think there was no fraud on them,—perhaps not on anybody. *What had been practiced in this case was proved to be the constant course of the trade, and notoriously so to everybody.*" 99 Eng. Rpts. at 165 (Emphasis supplied)

In *Stewart v. Bell,* 106 Eng. Rpts. 1179, 1180 (1821), the Court stated:

> "The underwriter is presumed to be acquainted with the usual course of the voyage and to take a premium accordingly."

In *Buck & Hedrick v. The Chesapeake Insurance Company,* 26 U. S. 151, 7 L. Ed. 90 (1828), our Supreme Court stated:

> "A knowledge of the state of the world, of the allegiance of particular countries, of the risks and embarrassments affecting their commerce, of the course and incidents of the trade on which they insure, and the established import of the terms used in their contract, must necessarily be imputed to underwriters. According to a distinguished English jurist, Lord Mansfield, in *Pelly v. The Royal Exchange &c.* (1 Burr. 341), '*the insurer, at the time of underwriting, has under his consideration the nature of the voyage, and the usual manner of conducting it. And what is usually done by such a ship, with such a cargo, in such a voyage, is understood to be referred to by every policy.*' " (26 U. S. at 160-161) (Emphasis supplied)

In *DeLonguemere v. New York Fire Insurance Company,* 10 N. Y. Rpts. 120 (1813), Chief Justice Kent stated, in connection with a marine underwriter's attempt to disclaim on the basis that the assured did not disclose the conditions at one of the intended ports of call of his vessel, stated:

> "The parties to the policy are to be presumed to have been acquainted, at the time of the subscription, with the nature and situation of the places to which the contract relates . . . *these were matters of fact and of general notoriety which both must be presumed equally to know.*" 10 N. Y. Rpts. at 124-126 (Emphasis supplied)

And in *Maryland Insurance Company v. Bathurst,* 5 Gill & Johnson, 159 (Md. 1833), the Court stated:

> "Neither can the Maryland Insurance Company in this case, be deemed uninformed of the practice of chartering neutral vessels at London and elsewhere, by the agents of the Spanish South American Governments for the transportation of military stores and troops; nor of such vessels being sold to the agents, deliverable in South America, for the purpose of being there used as national cruisers. *These were facts of universal notoriety in the commercial world, at the time of the issuance on* The Budget; *are a part of the public history of that epic against the light of which this Court cannot shut their eyes, and of which the law imputes knowledge to the appellants.*" 5 Gill & Johnson at 226 (Emphasis supplied)

In *Calbreath v. Gracy,* 4 F. Cass. 1030 (D. Pa., 1805), it was stated:

> "For, most certainly, it is the duty of the underwriters to know the course of the trade which they engage to

> insure; *and it will not afterwards lie in their mouths to object, that the assured had not disclosed what they knew, or ought to have known.*" 4 F. Cass. at 1032 (Emphasis supplied)

Clark et al. v. Manufacturers' Insurance Co., 49 U. S. 235, 248:

> "The insurer must be presumed to know what is material in the course of any particular trade—its usages at home and abroad, and those transactions which are public, and equally open to the knowledge of both parties."

See also *Livingston & Gilchrist v. Maryland Insurance Company*, 11 U. S. 506 (1813); *Norris v. Insurance Company of North America*, 3 Yeats 84 (1800); *Maritime Insurance Co., Ltd. v. M. S. Dollars S. S. Co.*, 177 F. 127 (9th Cir., 1910); and *Northwestern S. S. Co., Ltd. v. Maritime Insurance Co., Ltd.*, 161 F. 166 (W. D. Wash. 1908).

The Trial Court found that at all times relevant to this litigation, it was a common practice for vessels engaged in the grain trade from Gulf ports to India to take on excess bunkers at the port of Freeport, thereby leaving port in an overloaded condition, and that the practice of overloading vessels at Freeport was a common practice of the trade and widely known. The Court further found that the insurance carrier in this matter knew or should have known of this practice. Accordingly, the Court determined that the policy of insurance was not void and that appellees were entitled to recover under it.

It is now well established that findings of fact of a Trial Court shall not be set aside unless they are clearly erroneous. *McAllister v. U. S.*, 348 U. S. 19 (1954); *Guzman v. Pichirilo*, 369 U. S. 698 (1962); Rule 52(a) F. R. C. P.

Thus, in the matter of *SS Omnium Freighter v. Northwest Marine Iron Works, Inc.*, 341 F. 2d 420 (8 Cir. 1965), it was stated:

> "Determination of fact issues based upon contradictory and disputed testimony rests peculiarly with the trier of facts, in this case, the District Court, sitting without a jury. It was the duty of the Trial Judge, after hearing the testimony and seeing the witnesses, to find the facts and draw conclusions therefrom. . . . *Appellate review of such findings is extremely limited.*" (Emphasis supplied) 341 F. 2d 420, 423.

In the case at bar, there is no question but that the Court's finding is amply supported by the record.

There can be no question but that the practice involved of leaving Freeport overloaded was a well-established and well-known practice in the industry.

It developed at trial that Marine Consultants & Designers, Inc., a firm of naval architects employed by appellant, made a study of appellees' records pertaining to the alleged overloading of thirteen of the seventeen vessels operated by the appellees and covered by the policy. This study disclosed that between February, 1963, and August 13, 1964 (the inception date of the policy), thirty-seven voyages were made from United States Gulf ports to the Far East via Freeport, and on thirty-six of these voyages the vessels departed from Freeport overloaded. With respect to the thirty-seventh voyage, the study concluded that the vessel was "probably overloaded," though the specific records to prove it were not available. Subsequent to August 13, 1964, during the period the policy was in effect, Marine Consultants & Designers, Inc. studied nineteen voyages of appellees' vessels from Gulf ports to the Far East via Freeport and Ceuta. Of the nineteen voyages, there was evidence of overloading on seventeen.

Mr. Charles Diamond, Vice President of Dyson Shipping Company, which since 1952 has handled the shipping of bulk grains from the United States to India, testified that in the period from 1962 to 1964 the Indian government was shipping "four or five or more millions of tons of grain" from the United States to India. Dyson shipping records indicate that of the approximately 160 voyages made each year to India—by vessels operated by appellees as well as others—approximately 90 percent were made with loads exceeding the tonnage for which the vessel was chartered.

The ship's officers who were called to testify made it abundantly clear that this practice was a general practice in the industry and was well known throughout the industry. Captain Scarpello (138a), stated "It was common knowledge to all of us. We all knew it." Captain DiVenti stated that this practice was being done constantly and that it was common knowledge in the industry (141a). Other captains were prepared to testify to the same fact, however, they were not placed upon the stand because it was determined that the evidence would be merly cumulative.

Further, it was stipulated by counsel that had Captain Garth Read testified, he would have testified that the United States Coast Guard was well aware of this particular problem of overloading of ships at Freeport (159a-160a). Captain Read was in charge of marine inspection for the United States Coast Guard.

It is abundantly clear that the insurance underwriting community, as early as November 15, 1962, was aware of the practice of overloading by taking bunkers at Freeport. This was the subject matter of one of the regular meetings of the Board of Managers of the American Hull Insurance Syndicate, which Syndicate is composed of the great majority of marine underwriters (117a).

Appellant's expert, Suehrstedt, indicated that a Liberty or Victory ship, engaged in a Gulf Port to South Asia run, would be overloaded if it carried more than 9,400 tons of cargo. The destination of vessels and the amount of cargo that they carry is published by the Maritime Research Service on a weekly basis and the Journal of Commerce (112a). Mr. Blackman, the marine engineer for the Appellant, admitted that their office received both Lloyds' and the Journal of Commerce (55a). A review of the weights listed by Mr. Diamond indicate that the great majority of the vessels carried cargo in excess of 10,000 tons. Further, appellant's own expert made it abundantly clear that, by an analysis of the dead weight of the vessel as compared with the tonnage, most of the Quinn-Smith vessels were overloaded. A mere review of the documents available to the insurance company, which documents were received by the insurance company, would have revealed the overloading of the vessel. As was stated by the Supreme Court of Massachusetts in the case of *Green v. Merchants Insurance Company*, 27 Mass. 402 (1830):

> "It may be very true that underwriters are not, under all circumstances presumed to be acquainted with all the intelligence contained in the papers taken at their office. *But the general presumption is, that the agents of the office will examine with some care, the items of marine intelligence which are expressly designed, speedily to diffuse information upon a subject so immediately interesting to them, especially in relation to vessels belonging to their own port.*" 27 Mass. at 406-407 (Emphasis supplied)

The testimony of Mr. Robert Dwelly was of prime importance in the resolution of this matter. Mr. Dwelly

was a marine underwriter for the Insurance Company of North America for 37 years and prior to that was with the Maritime Insurance Company in Liverpool, England. He was the representative of the Insurance Company of North America as Board Manager of the Board of Directors of the American Hull Insurance Syndicate, which was made up of approximately seventy underwriting companies. Mr. Dwelly was in attendance at the meeting in 1962 where the Syndicate had brought to its attention the fact of the use of Caribbean ports for bunkering and overloading of vessels.[1]

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1. So clear was this practice that following the marine disaster upon which this case is based, in a volume entitled "Touching the Adventures and Perils, the American Hull Insurance Syndicate", it was stated as follows:

> "The year's best-publicized marine disaster, though it cost the syndicate only $466,151 was that which overtook the Victory-type American tramp ship, the Smith Voyager. En route from Houston to Indian ports, fully laden with grain, this vessel had stopped at Freeport in the Bahamas, following common shipping practice, to top off her oil bunkers for the long voyage ahead. Without question, (and not without precedent), she left Freeport overladen.
>
> "Five days later, in heavy mid-Atlantic weather, she was stopped by an engine breakdown, took a sharp, permanent list, and had to be abandoned, four lives being lost in the course of rescue operations by a German freighter. Taken in tow for Bermuda, she foundered on December 27th. After some deliberation, the syndicate determined to pay the total loss, 'without condoning the overloading which seemed apparent in the case,' and with a stipulation, 'that consideration be given to an appropriate advise, presumably through marine brokers, of the syndicate's strong feelings regarding violations of safety regulations'. An ironic aspect of this casualty was that, at a Board of Managers Meeting two years earlier, it had been asserted, 'That there is apparently no specification in bunkering ports such as Freeport with respect to the draft of vessels taking on fuel and water,' and that, 'vessels, already deeply laden with cargo, on entering the bunkering port, were sailing below their marks.' It took the Smith Voyager to drive the point home." (82a-84a)

In regard to the obligation of the underwriter, Mr. Dwelly testified as follows:

"By Mr. Barish:

"Q. Sir, would you say that an underwriter is charged, a good underwriter, let's say, is charged to make himself knowledgeable on what's going on in the industry?

"A. Definitely." (129a)

Later in his testimony, and in answer to the Court's questions, the witness testified as follows:

"The Court: Let me ask you this: Is a broker apt to know if, not saying this is the fact in this case, but let's assume that this fleet of vessels was overloaded on a regular basis. Is that something the broker is apt to know?

"The Witness: No, I would rather, if it's done on a regular basis I would rather charge the underwriter that he should have knowledge of that fact, if it's a part of the trade he is charged with the responsibility of knowing the practices of the trade. He doesn't——

"The Court: Is overloading a practice of the trade?

"The Witness: It was in this particular instance, I assume.

"The Court: Maybe you and I have different views on practice. What do you mean by practice?

"The Witness: Well, I would assume that if, just for the purpose of illustration, if 20 vessels sail from Freeport, 18 of which were overloaded, I would assume it was a practice of the trade.

"THE COURT: What trade?

"THE WITNESS: This particular grain trade.

"BY MR. KALAIDJIAN:

"Q. You mean the owners' practice in that trade?

"A. The owners, plural.

"Q. I am talking about the owner insurers' practice.

"MR. BARISH: I think he answered that already.

"A. Yes.

"THE COURT: I take it that is something that you would feel that an underwriter would be looking out for, would he?

"THE WITNESS: Yes, he should. He should. He should. You see, it's an awfully difficult thing to reduce to a concrete term." (132a-133a)

Accordingly, there is no question but that the insurance carrier in this matter is charged with the knowledge of the practice in the industry, i.e., of overloading by the use of bunkering at Caribbean ports. This being the case, there is no question but that their attempt at avoidance of the policy is not proper.

Appellant argues that the uncontradicted testimony of Dwelly and others did not demonstrate appellant's knowledge of the practice of overloading. However, the test is not whether the company had actual knowledge, but whether the practice was one of which they should have been aware. Putting to one side the fact that it is inconceivable that appellant did not have actual knowledge of this practice, there can be no question but that they should have known. Certainly, appellant's co-insurer of the "Smith Voyager," the American Hull Insurance Syndicate,

had actual knowledge of the practice. Certainly, the various mariners who testified and who could have testified had actual knowledge of the practice. Certainly, the Coast Guard had actual knowledge of the practice. And the slightest inquiry into the Journal of Commerce or any of the other documents which were available to this company would have given them the actual knowledge of the practice. Appellant's desire to convince this Court that it lacked the corporate knowledge that was possessed by practically every other American marine underwriter, because one member of its staff lacked personal knowledge of the practice, does not amount to the requisite burden of proof which the law imposes in this matter. It is important to note that with all of the facilities available to the defense, no evidence was adduced to the effect that the practice of the Smith Company was not a recognized practice in the industry and one which was well known, widespread and practiced by other companies as well.[2]

Nor was Blackman's testimony relevant. The test is not what the insurance company knew; the test is what is imputed to the insurance company because of a practice in the industry. A carrier may not avoid liability by failure to pursue a reasonable degree of inquisitiveness. In this regard, Mr. Dwelly testified:

> By Mr. Barish:
>
> "Q. And if there is something that is material, that he considers material to his risk, wouldn't you say that he has an obligation to ask that question in his questionnaires?

2. Appellant's reliance on cases such as *Gulfstream Cargo, Ltd. v. Reliance Ins. Co.*, 409 F. 2d 974 (5th Cir. 1969) is misplaced. In the cited case, the "material fact"—the structural integrity of the vessel—was one which was uniquely known only to the insured. In the case at bar, we are dealing with an unfortunate, but undisputed, industry-wide practice in the South Asia grain trade which was known to all facets of the martime community.

"A. That obligation comes from within himself. A good underwriter, yes, he will ask a lot of questions. Sometimes to the extent that brokers will not come back too often because they can find others that don't ask the questions, it's easier to place risks.

"Q. Mr. Kalaidjian read to you from this book, 'Property and Liability Insurance Handbook,' and read to you from your particular section or contribution to that handbook. I read you a sentence and ask you whether this also is not what you said and is not accurate.

" 'In the absence of the necessary degree of inquisitiveness on the part of the insurer he will be deemed to have waived the information insofar as that particular material fact is concerned.'

"Isn't that what you said?

"A. That is so.

"Q. And that is accurate?

"A. Yes. It's my opinion, I mean. That's my opinion.

"Q. Yes.

"Now,——

"A. I think you will find there are cases decided on it.

"Q. In that way?

"A. Yes.

"Q. Did you not also say, sir, the first sentence on page 254, speaking now of the obligations of the insurer as distinguished from the assured, 'As to the insurer, he is charged with knowing matters of general knowledge and being well-informed about trade usages and customs, routes, port conditions, as to handling, packing, the peculiarity of particular cargo, and in

the absence of the necessary degree of inquisitiveness,' to use your language in this particular line, '—he is deemed to be waived the necessity for that information.' Isn't that accurate?

"A. That is my judgment." (129a-130a)

In this regard, it should be noted that in the application for insurance there were no specific questions as to the issue of loading. Further, appellant's marine engineer stated that he never asked anyone whether they overloaded their vessels (58a-59a). It may be remembered that Mr. Blackman stated that insofar as the marine risks were concerned, his only care was the number and type of vessels in appellees' fleet. He did not care where the vessels were sailing, nor did he care what type of cargo was being carried by the vessels, nor did he ever discuss with any pending insured the nature of their business nor the cargoes they carried (58a-59a). As was stated in the case of *"The Bedouin"*, 7 Aspinall, Reports of Maritime Cases 391:

> "The assured is not bound to tell the insurer what the law is. He is bound to tell him, not every fact, but every material fact. His obligation is this, that if he is asked a question—whether a material fact or not—by the underwriters, he must answer it truly. If he answers it falsely with intent to deceive, though it may not be a material fact, it will vitiate the policy."

In this regard, Mr. Dwelly, in his chapter on marine insurance in the "Property and Liability Insurance Handbook", page 254, stated as follows:

> "As to the insurer, he is charged with knowing matters of general knowledge and being well informed about trade usages and customs, route, port conditions

(for example, whether goods are loaded and/or discharged by lighters), stowage, packing, and the peculiarities of a particular cargo (for example, tea being susceptible to taint from other cargo of certain types). However, in this day and age of constant change and high degree of specialization, an insurer is well advised not only to keep himself as well informed as possible but also to be certain to ask for any and all information he may need to evaluate the risk. It must be kept in mind that the insured and his broker need not disclose every minute detail. As Frederick Templeman and C. T. Greenacre say in their authoritative work on marine insurance, 'If sufficient is disclosed with regard to a material fact to enable an underwriter (insurer) to ask for further information, if he wants, that is enough.' In the absence of the necessary degree of inquisitiveness on the part of the insurer he will be deemed to have waived the information insofar as that particular material fact is concerned.''

Certainly, there can be no question but that the insurance carrier in this case failed to exercise even the slightest degree of inquisitiveness. There can be no question but that the practice in which the Smith vessels were engaged—of overloading—was well known in the industry. It was known by the mariners and the insurance carriers, as well as the Coast Guard. Under these circumstances, one cannot put his head in the sand to avoid information so as to afford it the right to collect premiums on the one hand and the ability to disclaim on the policy on the other.

One must question the sincerity of the carrier in the case at bar. There can be no question that the defense of concealment was an afterthought, designed to avoid the

payment under the policy. On May 13, 1965, nearly six months following the "Smith Voyager" loss, in a letter addressed to Frank B. Hall and Company, the defendant chose not to renew the policy involved in this matter and stated in this letter:

> "Referring to our previous discussions, our companies, as you know, quite some time ago decided to discontinue their participation in the Bumpershoot business.
>
> "Accordingly, *and for that reason alone,* insofar as the above three policies are concerned, we shall be obliged not to renew our interest upon their respective expiry dates.
>
> "*Please be assured that our declination to renew is not based upon a change of opinion as to the respective risks as such. . . .*" (421a)

This letter was written after the "Smith Voyager" loss and after the Coast Guard hearings. It was written at a time when overloading had already been established as a basis for the disaster.

Accordingly, the findings of fact of the Court below were bottomed upon overwhelming and uncontradicted evidence dealing both with the practice of overloading and the general knowledge of the industry concerning this well-publicized and widespread custom.

Appellant's reliance on such cases as *Cudahy Packing Co. v. Narizenfeld,* 3 F. 2d 560 (2nd Cir. 1924); *Central R. Co. v. Schich,* 38 F. 2d 968 (3rd Cir. 1930) and *Ramsauer, et al. v. United States,* 21 F. 2d 907 (9 Cir. 1927) is obviously misplaced. These cases stand for the proposition that custom may not be pleaded as an excuse for violating the law. That is not the issue in the case at bar. The Court below did not excuse the activities of Smith and Quinn and appellees did not argue that Smith and Quinn

were justified in overloading the vessels because others did. The thrust of the evidence as to custom in this case went to the issue of knowledge on the part of the appellant and not to the issue of standard of care. The District Court's findings of fact are amply supported in the Record and the Court's conclusion that the policy could not be voided is correct.

II. The Court Below Correctly Interpreted Ocean Marine Policy DE3540 to Allow Plaintiff's Indemnification for Personal Injury and Property Claims Occasioned by the Loss of the S. S. Smith Voyager.

Having recognized its inability to void Ocean Marine Policy DE3540 on the basis of concealment, appellant has chosen to defend on the ground that the loss of the "Smith Voyager" was excluded from the contract. This argument was quite correctly dismissed by the Court below.

Appellant's Ocean Marine Excess Policy, No. DE3540, contains in its section labelled "Exclusions" two pertinent parts:

> "I(a) This policy shall not apply to indemnify an Assured whose dishonesty or fraud, committed individually or in collusion with others, caused the loss for which that assured seeks indemnity; nor
>
> (b) to indemnify any Assured against claims based upon any intentional non-compliance with any statute or regulation *unless such claim(s) be for damages occasioned by actual or alleged bodily injury (fatal or otherwise) or physical loss of, damage to, and/or loss of use of tangible property . . . .*" (165a) (Emphasis supplied)

There can be no question but that the claims asserted against the assured are for "damages occasioned by actual

or alleged bodily injury'' and ''physical loss of, damage to, and/or loss of use of tangible property.'' Therefore, it follows that appellees fall within the protective orbit of clause 1(b) and are entitled to recover under the terms of this policy.

In a vain attempt to escape from the clear meaning of its own pre-printed contract, appellant argues that the word ''any'' contained in exclusion I(b) was not intended to cover an assured who actually participated in the intentional non-compliance with the statute. This argument is devoid of merit, both in fact and in law.

One need only turn to ''any'' standard dictionary to find the definition of the word ''any'' when used as an adjective:

> ''1. one or some *indiscriminately or whatever kind:* a: one or another taken at random (ask ——— man you meet) b: EVERY—used to indicate one selected without restriction (——— child would know that) 2. *one, some or all* of whatever quantity: a: one or more—used to indicate an undetermined number or amount (have you ——— money) b: ALL—used to indicate a maximum or whole (needs ——— help he can get) c: a or some without reference to quantity or extent 3. a: unmeasured or unlimited in amount, number or extent (——— quantity you desire) b: appreciably large or extended (could not endure it ——— length of time).''
>
> *Webster's Seventh New Collegiate Dictionary*, at p. 40.

Clearly, then, the phrase ''any Assured'' factually applies to Anne Quinn Corporation and Earl J. Smith & Co. The meaning of exclusions ''a'' and ''b'' is that an assured will not be indemnified for the loss of his own property when said loss is caused by his own dishonesty or fraud,

but will be indemnified to the extent of any claims of third parties for either personal or property damage occasioned by the same loss. In the context of Ocean Marine Excess Policy DE3540, Anne Quinn and Smith may not be indemnified for the loss of the S. S. Smith Voyager itself, or any interest they may have had therein, but are to be indemnified for the claims of the crew and the owners of the cargo.

To state, as appellant does, that there are no "public policy" considerations favoring recovery under the contract, is to ignore the overwhelming body of law which recognizes that if a reasonable construction can be placed on an insurance contract that would justify recovery, it is the *duty* of the Court to so construe it:

> "It is well settled that when any provision of an insurance policy is subject to more than one reasonable interpretation, the interpretation favoring the insured is adopted since the insurer authors the contract. It is also well settled that exceptions and words of limitations will be strictly construed against an insurer, and if a reasonable construction can be placed on the contract that would justify recovery, it is the duty of the Court so to construe it." *Aetna Casualty and Surety Co. v. Stover,* 327 F. 2d 288, 290 (8th Cir. 1964) (citations omitted)

The law does not distinguish policies of marine insurance on this ground. See *Allen N. Spooner & Son, Inc. v. Connecticut Fire Ins. Co.,* 314 F. 2d 753, 755 (2nd Cir. 1963). The basis for this public policy rationale is the simple fact that it is the insurer, appellant, who writes the contract and as one court stated:

> "If the companies were permitted to write clear clauses of liability at one point and obscure negations of liability at another, and to maintain successfully

> the prevalence of the latter over the former, the temptation to sell on one clause and defend on the other would be dangerous. If there be any ambiguity in a contract, it is the fault of the company alone, and, as we have said, the companies are fully equipped to avoid ambiguities." *Hayes v. Home Life Ins. Co.*, 168 F. 2d 152, 154-55 (D. C. Cir. 1948).

Thus, even if there were some possible ambiguity in the exclusionary terms of the policy, the law requires that it be interpreted in favor of recovery.

The Trial Court recognized the compelling public policy reasons demanding recovery

> "As between the insurer (who undertook the risk on the basis of its calculation of previous premium and loss experience, where the vessels traded, their cargo, upkeep, handling, management, and other factors relied upon by their underwriters) and the individual and cargo claimants (who were innocent of any misrepresentations or wrongdoing), the insurer should bear the risk that the insured might violate a statute or regulation which would cause a loss. As this court found, the cause of the VOYAGER's sinking was the overloading, which violated the Load Line Act, 46 U. S. C. § 85 et seq. As such, it constituted 'non-compliance with [a] statute' within the meaning of clause I(b), entitling the plaintiffs to indemnification for the personal injury and property damage claims."

Anne Quinn Corp. et al. v. American Mfg. Mut. Ins. Co., 369 F. Supp. 1312, 1318 (S. D. N. Y. 1973).

Appellant's argument that the premium for policy DE3540 did not take overloading into account is belied by the testimony of its own marine manager that he did

not know what factors were taken into account in the setting of the premium (80a), and by clause I(b) itself which clearly anticipates that claims might be asserted for losses occasioned by the intentional violation of a statute. The argument that the individual crew members "assumed the risk" of their own injuries and deaths, thereby losing their "superior equities", is at once both so legally unsound and ethically repugnant so as not to merit a reply.

In short, by the very terms of the policy itself, appellant is precluded from disclaiming liability. The judgment of the Court below should be affirmed.

CONCLUSION.

The judgment of the Court below should be affirmed.

Respectfully submitted,

MARVIN I. BARISH,
SANFORD I. JABLON,
ABRAHAM E. FREEDMAN,
Attorneys for Personal Injury and Death Intervenors-Appellees.

the address designated by said attorney(s) for that purpose by depositing a true copy of same enclosed in a postpaid properly addressed wrapper, in--a post office--official depository under the exclusive care and custody of the United States Post Office Department within the State of New York.

Lillian Rosenzweig

Lillian Rosenzweig

Sworn to before me this

4th day of September, 1974.

Ned R Phillips

NED R. PHILLIPS
NOTARY PUBLIC, State of New York
No. 24-8361125
Qualified in Kings County
Certificate filed in New York County
Commission expires March 30, 1976

AFFIDAVIT OF SERVICE BY MAIL

STATE OF NEW YORK, COUNTY OF NEW YORK) SS.:

The undersigned being duly sworn, deposes and says:

Deponent is not a party to the action, is over 18 years of age and resides at 2129 76 St. Brooklyn, N.Y.

That on the 4th day of September 1974 deponent served the annexed Brief

on all parties concerned

AFFIDAVIT OF SERVICE BY MAIL

STATE OF NEW YORK, COUNTY OF ss..

The undersigned being duly sworn, deposes and says:

Deponent is not a party to the action, is over 18 years of age and resides at

That on the day of 19 deponent served the annexed

on
attorney(s) for
in this action at
the address designated by said attorney(s) for that purpose by depositing a true copy of same enclosed in a postpaid properly addressed wrapper, in — a post office — official depository under the exclusive care and custody of the United States post office department within the State of New York.

Sworn to before me

this day of 19 .....

THE NAME SIGNED MUST BE PRINTED BENEATH